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Case CM1869M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the Application of :
Wendy Victoria Jane Young, et al. : Confirmation No. 5673
Serial No.: 09/744,836 : Group Art Unit: 1616
Filed: June 28, 2001 : Examiner: Sharmila S. Gollamudi

For: HAIR CARE COMPOSITIONS COMPRISING POLYSILOXANE RESINS WITH
DELOCALISED ELECTRONS

BRIEF ON APPEALS

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application. The Brief is being forwarded in triplicate.

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Respectfully submitted,

By

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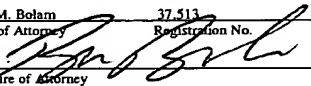
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Brian M. Bolam 37,513
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Signature of Attorney

Case CM1869M

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In the Application of :
Wendy Victoria Jane Young, et al. : Confirmation No. 5673
Serial No.: 09/744,836 : Group Art Unit: 1616
Filed: June 28, 2001 : Examiner: Sharmila S. Gollamudi

For: HAIR CARE COMPOSITIONS COMPRISING POLYSILOXANE RESINS
WITH DELOCALISED ELECTRONS

APPELLANT'S BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is an appeal from the Final Rejection of Claims 1-15 by the Primary Examiner in Group Art Unit 1616 on February 27, 2003.

Jurisdiction for this Appeal resides in the Board of Appeals and Interferences under the provisions of Section 134, Title 35, United States Code, by way of a Notice of Appeal and requisite filing fee filed in the United States Patent and Trademark Office with a Certificate of Mailing on June 3, 2003.

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(1) **REAL PARTY IN INTEREST**

The real party in interest in this Application is the recorded Assignee, The Procter & Gamble Company of One Procter & Gamble Plaza, Cincinnati, Ohio 45202, by virtue of an assignment recorded September 12, 2002 at Reel 013082 Frame 0402.

(2) **RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences.

(3) **STATUS OF CLAIMS**

- (a) Claims cancelled: None.
- (b) Claims withdrawn from consideration but not cancelled: None.
- (c) Claims pending: Claims 1 to 15.
- (d) Claims allowed: None.
- (e) Claims rejected: Claims 1 to 15.
- (f) Claims on Appeal: Claims 1 to 15.

(4) **STATUS OF AMENDMENTS FILED SUBSEQUENT TO FINAL REJECTION**

No amendments subsequent to the Final Office Action have been filed.

(5) **SUMMARY OF THE INVENTION**

The claimed invention relates to hair care compositions containing a select class of polysiloxane resins that have been found, when present on a weight basis in a concentration of from 0.1% to about 5%, to reduce tackiness and greasiness of the composition while delivering good conditioning and shine benefits. These properties of the composition make it ideal for use as a leave-on hair treatment composition, that is, a composition that is applied to the hair and that remains on the hair without a rinsing step. Specification at Page 3, line 31 bridging to Page 4, line 2.

The select class of polysiloxane resins that provide these benefits to the claimed compositions are polysiloxane resins that have at least one substituent group possessing delocalized electrons. As more fully explained in the Specification at Page 6, polysiloxane resins are defined by those of ordinary skill in the art by the symbols M, D,

T, and Q (denoting, respectively, mono-, di-, tri-, and tetrafunctional units. Primes, i.e., M', D', T', and Q', are used to indicate that the unit M, D, T or Q contains a substituent group that is other than methyl.

In accordance with the present invention, **the polysiloxane resin must contain at least one of M', D', T' or Q' functionality that possesses a substituent group with delocalized electrons.** The 2-phenyl propyl alkaryl substituent group is particularly preferred. Specification at Page 5, lines 5-6. M'Q polysiloxane resins are preferred. Specification at Page 6, line 19.

Claim 1 is an independent composition claim drawn to hair care compositions containing from about 0.001% to about 5% of a polysiloxane resin wherein at least one substituent group of the resin possess a delocalized electron, and which composition is a leave-on composition. Claims 2 to 8 and 11 to 15 depend directly or indirectly from Claim 1 and further limit the scope of the invention of Claim 1. Claim 5 dependent from Claim 1 states that the polysiloxane is a 2-phenyl propyl substituted polysiloxane resin, which substituent group is preferred. Claim 9 is drawn to a method of conditioning hair by applying an effective amount of a composition according to Claim 1. Claim 10 is drawn to a packaged product comprising a composition according to Claim 1 and a suitable package for the composition wherein the package has instructions indicating that the composition is intended to be left on the hair.

(6) **ISSUES**

The issue presented for appellate determination by way of this Appeal is the propriety of the Final Rejection of the appealed claims on the following grounds:

- (a) the rejection of Claims 1 to 4, 6 to 9 and 11 to 15 under 35 U.S.C.102(b) as anticipated by U.S. Patent No. 5,567,428 to Hughes ("Hughes");
- (b) the rejection of Claims 1 to 15 under 35 U.S.C. 103 (a) for obviousness over Hughes;
- (c) the rejection of Claim 5 under 35 U.S.C. 103 (a) for obviousness over Hughes in view of GB 2 297 757 ("GB '757"); and

(d) the rejection of Claims 1 to 15 under 35 U.S.C. 103 (a) for obviousness over U.S. Patent No. 5,482,703 to Pings ("Pings") in view of GB '757.

(7) **GROUPING OF THE CLAIMS**

Claims 1 to 15 stand or fall together.

(8) **ARGUMENTS**

PTO'S POSITION

(A) The position of the U.S. Patent and Trademark Office concerning the rejection of Claims 1 to 4, 6 to 9 and 11 to 15 under 35 U.S.C. 102 is as follows:

The Examiner states that

"Hughes discloses a hair conditioner containing a non-volatile polysiloxane resin..., a dimethicone copolymer, and a lipid material (cetyl alcohol) (Note example IX and X). Hughes discloses the substituent group is selected from aryl, arylalkyl, and alkaryl (col. 12, lines 24-40). The reference discloses a viscosity of 100 centistokes and the preference for MQ resins.... A hair conditioner and shampoo are taught in Examples IX and X." (Final Office Action, Page 2, first full paragraph.) (Hughes citations omitted, in part.)

The Examiner goes on to state in the paragraph bridging pages 2 and 3 of the Final Office Action,

"...Hughes discloses and exemplifies polysiloxane polymers with R groups selected from aryl, arylalkyl, and alkaryl groups. The examiner points out that these substituent groups inherently contain delocalized electrons. Although the reference does not explicitly disclose this property of the instant R groups, it is a property of these to groups to rearrange their electrons in a more stable arrangement." (Hughes citations omitted.)

Regarding the method claim (Claim 9) of conditioning hair, the Examiner "... points to example XI (sic example IX) wherein the composition is a hair conditioner containing the instant polysiloxane resin." Page 3 of the Final Office Action, lines 11-12 of the paragraph bridging from Page 2.

(B) The position of the United States Patent & Trademark Office concerning the 35 U.S.C. 103 obviousness rejections based in whole or in part on the Hughes reference are as follows:

- (a) In the rejection of Claims 1 to 15 predicated on Hughes only, the Examiner reiterates his understanding of the Hughes reference as teaching (i) a hair conditioner containing a non-volatile polysiloxane, a dimethicone copolymer, and lipid material, noting examples IX and X; (ii) a substituent group selected from aryl, arylalkyl, and alkaryl; (iii) a viscosity of 100 centistokes for the resin, (iv) a preference for MQ resins, and (v) a hair conditioner and a shampoo taught in examples IX and X. The Examiner states that Hughes does not exemplify the polysiloxane resin having a 2-phenyl propyl substituent group. Moreover, the Examiner acknowledges that a package is not taught.

The Examiner states that

“[I]t would have been obvious to one of ordinary skill in the art at the time the invention was made to [use] any one of the suggested substituent groups since the reference teaches that they are all suitable. It is deemed obvious to one of ordinary skill in the art at the time the invention was made for one to place the composition in a packaged container in order to make it available to the consumer.” (Final Office Action at Page 4, second full paragraph.)

The Examiner also maintains that Claim 5 is obvious over Hughes in view of GB ‘757, as GB’757 teaches a low viscosity organofunctionalized siloxysilicate. The low viscosity of the siloxysilicates of GB ‘757, according to the Examiner, allows for high loading of active ingredients without the deleterious effects such as difficulty in spraying. According to the Examiner, GB ‘757 teaches the modified siloxysilicates possess higher refractive indexes than other alkyl substituted siloxysilicates. The Examiner concludes that it would be obvious to combine the teachings of Hughes and GB ‘757 since GB ‘757 teaches the modified resins have high refractive indexes for shine.

(C) With respect to the rejection of Claims 1 to 15 over Pings in view of GB ‘757, the Examiner states the following:

“Pings discloses a hair conditioning composition containing dimethicone copolyol (col. 3), nonvolatile polydimethylsiloxane, lipid material (col. 4, lines 60-65), and a cationic surfactant (col. 5) in instant amounts (Note claim 1 and examples).

“Pings does not teach the instant polysiloxane resin.

“GB [‘757] teaches a low viscosity organofunctionalised siloxysilicates for hair care compositions....

“It would have been obvious ... to combine the teachings since GB [‘757] teaches the modified resins have a high refractive indexes (sic) for shine and soil resistance. It is deemed obvious ... for one to place the composition in a packaged container in order to make it available to the consumer.” (Final Office Action, Page 6 first full paragraph, bridging to Page 7, continuing paragraph.)

**ARGUMENT 1. THE U.S. PATENT & TRADEMARK OFFICE
IMPROPERLY CONSTRUED THE HUGHES REFERENCE
RESULTING IN A MISAPPLICATION OF 35 U.S.C. 102 (b)**

Anticipation is established only when a single unit of prior art discloses, expressly or under the principles of inherency, each and every element of the claimed invention. *RCA Corp. v. Applied Digital Data Systems, Inc.*, 221 U.S.P.Q. 385, 388 (CAFC 1984). Such test is strictly applied. *Studiengesellschaft Kohle GmbH v. Dart Industries*, 216 U.S.P.Q. 381, 384 (D. Del. 1982). The single piece of prior art must disclose the elements arranged in the same manner to obtain a similar result as required by the claims. *Lindemann Machinefabrik GmbH v. American Hoist & Derrick Co.*, 221 U.S.P.Q. 481, 485 (CAFC 1984).

Hughes concerns topical personal care compositions containing a polysiloxane-grafted **adhesive** polymer, which adhesive polymer is solubilized in a volatile water insoluble solvent, namely, a volatile silicone. The compositions of Hughes also contain a nonvolatile drying aid for the polysiloxane-grafted adhesive polymer. The adhesive polymers of Hughes are described at Col. 3, line 63 to Col 8, line 33 of the Hughes patent; the volatile silicone solvent is described at Col. 8, line 34 to Col. 10, line 31; the

drying aid is described at Col. 10, line 32 to Col. 15, line 2, and silicone hair conditioning agents, which are nonessential components of the Hughes compositions, are disclosed at Col. 23, line 35 to Col. 24, line 64. Hughes is seen to contain four and optionally five different types of silicone materials.

The drying aid according to Hughes is a necessary adjuvant for the polysiloxane-grafted adhesive polymer, to facilitate continued evaporation of the volatile solvent that would otherwise be trapped beneath the surface of the film formed by the adhesive polymer. The Hughes patent identifies numerous examples of drying aids, which are in general silicon-containing materials (Col. 10, line 61) that are water insoluble and nonvolatile. More specifically, Hughes identifies the drying aids as silicone fluids, silicone resins, and silanes, which, taken together include many thousands of silicon containing materials. Among the drying aids, Hughes makes mention of silicone resins. According to Hughes, the silicone resins include MDTQ resins (Col. 11, line 42-44). Hughes states that these are preferred (Col. 11, line 65 to Col. 12, line 3). Hughes also refers to the primes of the unit symbols (Col. 11, lines 50 to 54), but these are not identified as preferred. Hughes states that the preferred substituent is methyl (Col. 11, lines 66-67).

In the Final Office Action (Page 2, paragraph bridging to Page 3), the Examiner referred to column 12, lines 24-35 of Hughes as disclosing and exemplifying polysiloxane polymers with R groups select from aryl, arylalkyl, and alkaryl groups. It is clear, however, that **this potion of the Hughes disclosure concerns a different class of drying aids**, namely, noncrosslinked silicone fluids and waxes, not silicone resins that are crosslinked polymers.

At several places in the Final Office Action, the Examiner also refers to Examples IX and X as illustrative of a hair conditioner product and a shampoo product, respectively. The Examiner states in the Final Office Action at page 3, paragraph bridging from page 2, that Example XI (sic Example IX) "...[I]s a hair conditioner containing the instant polysiloxane resin."

The Examiner incorrectly construes Example IX. Example IX of Hughes contains the Copolymer Premix of Example IV (or alternatively the premixes of Examples V and VI), which premixes contain the polysiloxane-grafted adhesive polymer and the volatile solvent therefor. The premixes also contain the trimethylsiloxysilicate, which is not a polysiloxane resin within the scope of the claimed invention, as it does not contain a primed functional unit. Example IX also contains silicone gum, GE SE76, a silicone hair conditioning agent identified at Col. 24, lines 47 to 64, which is not a crosslinked polysiloxane; octamethyl cyclotetrasiloxane, a volatile silicone identified at Col. 9, lines 15 to 18, and dimethicone copolyol, which is a polymer of dimethylsiloxane with polyoxyethylene and/or polyoxypropylene side chains, and is not a crosslinked polysiloxane resin.

Accordingly, it is seen that Example IX of Hughes, contrary to the position of the USPTO, does not exemplify hair conditioner compositions containing crosslinked polysiloxane resins having delocalized electrons. Moreover, the composition of Example IX is stated to be a rinse-off hair conditioner. Col. 34, line 4.

The Hughes patent does not anticipate the claimed invention, expressly or under the principles of inherency, simply because not all elements of the claimed invention are set forth unambiguously in the Hughes reference. Example IX of Hughes does not disclose a conditioner composition containing the polysiloxane resin of the present invention, and the conditioner composition of Example IX is not a leave-in hair care composition. Moreover, the Hughes specification as a whole does not disclose hair care compositions that are leave-on compositions that must contain a polysiloxane resin having a substituent group possessing delocalized electrons in order to realize the reduced tackiness and reduced greasiness benefits of the present invention.

Because numerous drying aids are disclosed in Hughes that are not polysiloxane resins having a substituent group possessing delocalized electrons, and because there is no disclosure of a leave-in hair care composition containing the polysiloxane resins of the present invention, selection of the polysiloxane resin consistent with the claimed scope of

the present invention is required. Such selection requirement is antithetical to a rejection predicated on anticipation.

Thus, there is no clear and unambiguous teaching in Hughes that provides the present invention within the four corners of that reference.

**ARGUMENT 2. THE U.S. PATENT & TRADEMARK OFFICE
IMPROPERLY RECONSTRUCTS THE DISCLOSURES IN
THE REFERENCES BASED ON THE HINDSIGHT FROM
APPLICANT'S DISCLOSURES; THE REFERENCES
CONTAIN NO MOTIVATION TO RECONSTRUCT THE
REFERENCE DISCLOSURES IN THE MANNER
PROPOSED BY THE U.S. PTO**

Obviousness is a question of law based upon the factual inquiries established by the Supreme Court in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 U.S.P.Q. 459, 467 (1966). Under Graham the following factual inquiries must be made in order to reach a legal conclusion of obviousness: (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the art, and (4) whether the subject matter of the claimed invention, as a whole, is unobvious in light of the differences.

In the rejection of Claims 1 to 15 for obviousness over Hughes, the Examiner equates the drying aid of Hughes with the crosslinked polysiloxane resin having a substituent group that possesses delocalized electrons. The Examiner concludes that it would be obvious to arrive at the leave-on hair treatment compositions of the present invention in light of the Hughes disclosure.

In this regard, Applicant believes the Examiner erred in his construction of the Hughes reference. Hughes concerns personal care compositions generally, including shampoos, hair conditioners, anti-acne compositions, sunless tanning compositions, sunscreen compositions, etc. These compositions are characterized as containing a polysiloxane-grafted **adhesive** polymer and a drying aid to enhance drying of the film formed by the adhesive polymer. The inclusion of the drying aid is directly related to the

presence of the adhesive polymer. Thus, Hughes concerns both anti-acne products as well as shampoo products. It is the functionality of the adhesive polymer that is improved by the incorporation of the drying aid.

Hughes discloses a large array of suitable drying aids, namely, certain silicone resins, silicone fluids, silicone waxes, alkylamino substituted silicones, cationic silicone fluids, and nonvolatile silane liquids. The requirement of the drying aid is that it facilitate continued evaporation of the volatile solvent present in the composition. Hughes has a preference for polysiloxane resins that have methyl substituent groups.

As set forth in the specification, the polysiloxane resins of the present invention are not the MQ resins of Hughes. Rather, the resins of the present invention must have at least one prime unit, i.e., must have a substituent other than methyl. Page 6, lines 8-13. There is no motivation present in Hughes to select from among the array of drying aids a particular drying aid that (a) is not preferred, (b) is not exemplified in any example, and (c) provides benefits neither contemplated nor appreciated. Accordingly, one of ordinary skill in the art at the time the invention was made would have no reason to select polysiloxane resins having a substituent group possessing delocalized electrons from among the array of enumerated drying aids. Moreover, there is no reason for the person of ordinary skill to select the particular polysiloxane resins of the present invention for a leave-on hair treatment composition when the Hughes invention is general to many disparate types of personal care products.

When the only suggestion or motivation for the PTO's modification of the reference stems from an applicant's disclosure and not from the prior art, the rejection is erroneous. *In re Ehrreich*, 200 U.S.P.Q. 504 (CCPA 1979). Both the suggestion and expectation of success must be found in the prior art, not in the applicant's disclosure. *In re Dow Chemical Co.*, 5 U.S.P.Q. 2d 1519, 1531 (CAFC 1988).

There is also no motivation for the practitioner of ordinary skill in the art to look to the teachings of GB '757 to resolve the deficiencies of the Hughes reference. GB '757 identifies certain functionalized polysiloxane resins that would, based on the disclosure of

Hughes, be suitable as the nonpreferred drying agents of Hughes. Again, there is no motivation to one of ordinary skill in the art to select the resins of GB '757 over the array of other, more preferred drying agents in the personal care compositions of Hughes.

In the rejection of Claims 1 to 15 over Pings in view of GB '757, the Examiner admits that Pings does not teach compositions containing a polysiloxane resin. The Examiner relies on GB '757 to modify the teaching of Pings to arrive at the instant invention.

Pings discloses hair conditioning compositions containing in stated proportions a silicone conditioning agent, a dimethicone copolyol, a lipid material, a cationic surfactant vehicle material, and water. The conditioner **products of Pings are rinse-off products**, as clearly indicated at Col. 7, lines 56-67 and at Col. 8, lines 42-44. In contrast, **it is an element of Claim 1 that the compositions are leave-on hair treatment compositions**. Such products, because they are to remain on the hair, have specific attributes as compared to rinse-off products. Specifically, the leave-on products should have reduced tack and reduced greasiness. The polysiloxane resins of the present invention provide these attributes.

Combining GB' '757 with Pings is a hindsight attempt to obtain the presently claimed invention. At best combining GB '757 with Pings only results in a rinse-off type product. In addition the resins of GB '757 include species that do not have substituent groups that possess delocalized electrons. Thus, the substituent groups R^1 and R^2 may be methyl and the substituent groups M^1 and M^2 may be hydrogen or methyl. Accordingly, the practitioner of ordinary skill must first select from GB '757 specific resins that have delocalized electrons even though there is no guidance absent the disclosure of the present invention to do so, and then must change the very nature of the composition of Pings. The only way that the PTO has been led to attempt to modify and reconstruct the disclosures in the cited patents is based on the impermissible hindsight afforded Appellant's disclosure.

The absence of such teach and motivation in the prior art and the impermissible use of Appellant's disclosure renders each of the 35 U.S.C. 103 rejections erroneous and therefore unsustainable. *In re Laskowski*, 10 U.S.P.Q. 2d 1397, 1398-99 (CAFC 1989); *In re Newall*, 13 U.S.P.Q. 2d 1248 (CAFC 1989).

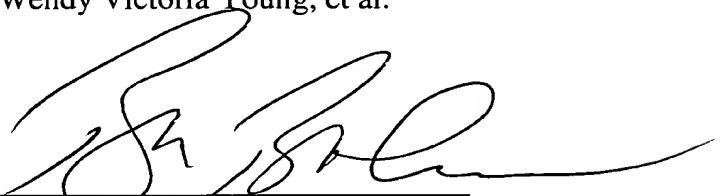
PRAYER FOR RELIEF

For all the reasons set forth in the foregoing Arguments and in view of the authorities supporting same, it is respectfully submitted that the rejection of Claims 1 to 4, 6 to 9, and 11 to 15 for anticipation under 35 U.S.C. 102 (b) over U.S. Patent 5,567,428 is erroneous, said rejection being unsupported in fact and law. Further, it is respectfully submitted that the rejections of Claims 1 to 15 for obviousness under 35 U.S.C. 103 (a) over U.S. Patent 5,567,428; of Claim 5 for obviousness under 35 U.S.C. 103 (a) over U.S. Patents 5,567,428 and GB 2 297 757, and of Claims 1 to 15 for obviousness over U.S. Patents 5,482,703 and GB 2 297 757 is erroneous, said rejection being unsupported in fact and law.

Reversal of the Final Rejection of Claims 1 to 15 and an indication of the allowability of said claims over the cited references is respectfully requested.

Respectfully submitted,
Wendy Victoria Young, et al.

By



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09/744,836

(9) APPEALED CLAIMS

1. A hair care composition comprising from about 0.001% to about 5% of polysiloxane resin, wherein at least one substituent group of the resin possesses delocalised electrons and wherein the composition is a leave-on composition.
2. (Once amended) A hair care composition according to Claim 1 wherein the polysiloxane resin comprises from about 0.01% about 2%, by weight, of the total composition.
3. (Twice amended) A hair care composition according to Claim 1 wherein the polysiloxane resin substituent group possessing the delocalised electrons is selected from the group consisting of aryl, arylalkyl and alkaryl groups.
4. (Once amended) A hair care composition according to Claim 1 wherein the polysiloxane resin substituent group possessing the delocalised electrons is selected from alkaryl groups.
5. (Once amended) A hair care composition according Claim 1 wherein the polysiloxane is a 2-phenylpropyl substituted polysiloxane resin.
6. (Once amended) A hair care composition according to Claim 1 wherein the polysiloxane resin has a viscosity of less than about $5000 \text{ mm}^2\text{s}^{-1}$, at 25 C.
7. (Once amended) A hair care composition according to Claim 1 wherein the polysiloxane resin is an M'Q resin.
8. (Once amended) A hair care composition according to Claim 1 wherein the composition further comprises C_8 to C_{22} fatty alcohol.
9. (Once amended) A method of conditioning hair by applying to the hair an effective amount of a composition according to Claim 1.

09/744,836

10. (Once amended) A packaged product comprising a composition according to Claim 1 and a suitable package for said composition wherein the package has instructions indicating that the composition is intended to be left on the hair.
11. A hair care composition according to Claim 1 wherein the polysiloxane resin comprises from about 0.1% to 1%, by weight, of the total composition.
12. A hair care composition according to Claim 1 wherein the polysiloxane resin has a viscosity of less than about $1000 \text{ mm}^2\text{s}^{-1}$, at 25 C.
13. A hair care composition according to Claim 1 wherein the polysiloxane resin has a viscosity of less than about $600 \text{ mm}^2\text{s}^{-1}$, at 25 C.
14. A hair care composition according to Claim 1 wherein the composition further comprises C_{12} to C_{18} , fatty alcohol.
15. A hair care composition according to Claim 1 wherein the composition further comprises C_{16} , fatty alcohol.